SUPREME COURT, U. S.

FEB 27 1969

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 483

PEARL DETENBER, Administratrix of the Estate of TERRY DETENBER, Deceased and VIOLA B. TOWNSEND, Administratrix of the Estate of RICHARD MATTINGLY, Deceased, - - - - - - - - Petitioners,

versus

AMERICAN UNIVERSAL INSURANCE COMPANY, - - - - - - - - Respondent.

RESPONSE TO PETITION FOR REHEARING ON DENIAL OF WRIT OF CERTIORARI.

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AMERICAN UNIVERSAL INSURANCE COMPANY, - - - - - - *Respondent.*

RESPONSE TO PETITION FOR REHEARING ON DENIAL OF WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

This Response to Petitioners' Petition for Rehearing on denial of Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit is submitted pursuant to order of this court dated January 29, 1968.

Petitioners urge two reasons for granting their Petition for Rehearing. Their Petition for Writ of Certiorari was heretofore denied by this court December

4, 1967, with Mr. Justice Black dissenting. Petitioners contend first that the decision of the Kentucky Court of Appeals in the case of *State Farm Mutual Auto Insurance Company* v. *Marcum,* (decided March 31, 1967), 320 S. W. 2d 113, changes the Kentucky law followed by the Sixth Circuit Court of Appeals and that this decision is an intervening circumstance of substantial and controlling effect requiring the granting of the Writ of Certiorari. Secondly, petitioners contend, *for the first time,* that their right to trial by jury under the Seventh Amendment of the Constitution was denied. We shall respond to these contentions in the reverse order in which they are presented.

THE QUESTIONS PRESENTED.

1. Was the petitioners' right to trial by jury denied or infringed upon by the entry of summary judgment against them where petitioners vigorously insisted in the District Court and the Court of Appeals that no material issue of fact existed and petitioners themselves were entitled to summary judgment?
2. Does the decision of the Kentucky Court of Appeals in State Farm Mutual Insurance Company v. Marcum, *supra,* change the law of Kentucky relied upon by the District Court and the Circuit Court of Appeals and constitute an intervening circumstance of substantial or controlling effect since the order of this court denying the Writ of Certiorari?

Respondent respectfully submits that both these questions are properly answered in the negative and that the Writ of Certiorari was properly denied by this court December 4, 1967.

REASONS FOR DENYING THE PETITION FOR REHEARING.

1. Petitioners Were Not Denied the Right to Trial By Jury in Violation of the Seventh Amendment of the Constitution By the Entry of a Summary Judgment Against Them By the District Court.

Petitioners concede that they never contended heretofore in the District Court or in the Circuit Court of Appeals that the granting of summary judgment by the District Court infringed upon or denied them their right to trial by jury. Petitioners urge this position for the first time in their Petition for Rehearing of Writ of Certiorari and understandably and obviously their position is based upon the dissenting opinion of Mr. Justice Black.

While we recognize that this court has the power to consider a plain error not specified below in the interest of justice, only in exceptional cases will this court review a question not raised in the courts below. *Duignon* v. *United States,* 274 U. S. 195, 200, 71 L. Ed. 996, 1000, 47 S. Ct. 566; *Husty* v. *U. S.,* 282 U. S. 694, 701, 702, 75 L. Ed. 629, 632, 633, 51 S. Ct. 240.

Contentions not made in the trial court, and grounds of recovery not there suggested or urged, are not ordinarily considered. *Thomas* v. *Taylor,* 224 U. S. 73, 56 L. Ed. 673, 32 S. Ct. 403. It has been repeatedly

determined that Courts of Appeal will adhere to the theory of the case pursued in the trial court and will not, as a rule, consider objections resting on a different theory from that upon which the complaining party tried his case below. *Helvering* v. *Wood,* 309 U. S. 344, 84 L. Ed. 796, 60 S. Ct. 551; *McCullough* v. *Cammerer Corporation,* 323 U. S. 327, 89 L. Ed. 273.

In the District Court petitioners filed their Motion for Summary Judgment supported by affidavit. Petitioners undertook to discharge the burden of demonstrating that there was no genuine issue of fact and vigorously urged upon the District Court in oral argument and by written brief, that they were entitled to judgment as a matter of law. Respondent in the District Court likewise sought summary judgment and supported its motion by an affidavit filing the entire transcript of evidence in the state court proceedings that gave rise to this litigation.

The District Court did not proceed hastily, but considered, in addition to the pleadings, the affidavits filed and the transcript of evidence in the state court proceedings, the deposition of Michael Clark's personal counsel which the District Court required to be taken and filed as additional testimony prior to rendering summary judgment. It was, therefore, only after the most careful consideration of the extensive record and after giving all parties every opportunity to bring before the court any desired evidence that the District Court finally rendered summary judgment in favor of the respondent.

Following this, petitioners on their appeal to the Circuit Court of Appeals vigorously urged upon that court in their brief, and in their oral argument, that there was no genuine issue of fact and that the litigation should properly be disposed of by summary judgment. In the prayer for relief in the Circuit Court of Appeals, petitioners contended

> "that the judgment below should be reversed and the case remanded to the District Court with directions to set aside the Judgments in favor of the defendant-appellee, American Universal Insurance Company, and in lieu thereof to direct the court to enter a judgment in favor of the plaintiff-appellant."

While it is true that the appellate courts are not bound by the trial court's rulings on questions of law, nevertheless, litigants should not be permitted to urge a position in the trial and appellate courts and when adverse judgment is rendered, then attempt to assert a totally different position.

We do not understand that Mr. Justice Black in his dissenting opinion takes the position that the summary judgment procedure prescribed by Rule 56(c) of the Federal Rules of Civil Procedure deprives the party of constitutional right to trial by jury. This court in commenting on the question of right to trial by jury in relationship to the summary judgment procedure before the adoption of the Federal Rules of Civil Procedure in *Fidelity and Deposit Company of Maryland* v. *United States,* 187 U. S. 315, 320, 47 L. Ed. 194, 198, 23 S. Ct. 120 (1902), observed:

> "if it were true that the rule deprived plaintiff in error of the *right* of trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right to trial by jury accrues. The purpose of the rule is to preserve the court from frivolous defenses and to defeat attempts to use formal pleadings as means to delay the recovery of just demands."

Since the adoption of the Federal Rules, the constitutionality of Rule 56 has always been sustained. *Lindsey* v. *Levy* (CCA 9th, 1945) 149 F. 2d 899, cert. den. 326 U. S. 783, 90 L. Ed. 474, 66 S. Ct. 331 (1946). The court in Lindsey v. Levy, *supra,* stated:

> "If the only question involved in the litigation is one of law and there is no dispute as to material issues of fact, there is no room for a contention by the losing party that the granting of a motion for summary judgment deprives it of a jury trial."

We interpret Mr. Justice Black's dissenting opinion to express the view that under the facts recited in his dissent, he finds sufficient evidence of bad faith on the part of the Insurance Company to require the court to submit the issue to the jury.

Professor Moore in his text concerning summary judgment based on affidavits, makes the statement:

> "*Stubborn reliance* upon allegations and denials in the pleadings will not alone suffice, when faced with affidavits or other materials showing the absence of trial issues of material fact." Vol. 6 Moore's Federal Practice, 2d Ed. § 56.11, p. 2170.

Petitioners in their appellate briefs, both in the Circuit Court of Appeals and before this court, have *stubbornly relied upon* incorrect statements of fact not supported by the record. Petitioners have repeatedly urged in their briefs that the Respondent's insured, Michael Clark, proceeded to trial in the state court with the understanding that his defense would be the lack of negligence on his part, and they have *stubbornly asserted* in their briefs that Michael Clark for the first time on the day of the trial of the state court action became apprised of the fact that Insurance Company's counsel would urge as a defense the assumed risk of Clark's passengers, who were plaintiffs in the state court action.

The *record* establishes beyond per adventure of a doubt that more than *eight months prior to the trial* of the state court action, Insurance Company counsel advised Clark's *private counsel,* Hon. Frank E. Haddad, Jr., in writing:

> "At the same time it is our belief there is a good defense of contributory negligence available to Mr. Clark on the suits on behalf of his passengers" (R. 113b).

Mr. Haddad, an experienced attorney, and member of the bar of this court, testified in his deposition in the District Court relative to the decision of Insurance Company counsel to assert the defense of assumed risk:

> "I would say, based on the police court transcript, that any attorney would have to say that the defense was available" (App. 114b).

A copy of the amended pleading filed on the first day of the state court trial *asserting the defense of assumed risk was delivered to Clark's personal counsel,* Mr. Haddad, who was present on that occasion at the trial and in the chambers of the court during the preliminary pretrial proceedings at which counsel for the Insurance Company advised the court and all counsel present that it was Insurance Company counsel's opinion that the *sole defense* available to the Clark boy was the defense of assumed risk (R. 2b). The Circuit Court of Appeals recognized in its opinion, and the record is uncontradicted, that not only initially, was this position expressed, *but repeatedly* throughout the seven-day trial of the case in the state court, counsel for the Insurance Company was insisting that the best defense available to Clark was the defense of assumed risk.

The defense of assumed risk asserted by Insurance Company counsel, called to the attention of Clark's *personal counsel* eight months before trial and throughout the trial, was no novel or unusual scheme dreamed up by Insurance Company counsel to benefit the interest of Insurance Company and to surprise Clark. The defense of assumed risk of the passengers had been asserted *from the outset* by the bus company in its pleadings and was vigorously and relentlessly pursued during the seven-day trial by Transit Company's counsel, who introduced the evidence that formed the basis for this defense.

Another position, *stubbornly* advanced by Petitioners' Counsel, in their appellate briefs, contrary to

the record in the case, but which, the Circuit Court of Appeals, and Mr. Justice Black both apparently accepted as being true, was the contention that Insurance Company counsel permitted evidence that Clark had entered a plea of guilty in a related criminal action without objection, and in addition violated an agreement with Clark's personal counsel that Clark would have an opportunity to explain his plea of guilty to negligent homicide. *These contentions are not supported by the record.*

The law of Kentucky is firmly established that a plea of guilty, in a related criminal action, is admissible in the subsequent civil action. *Race* v. *Chappel*, 202 S. W. 2d 626; *Watson* v. *K&I Bridge and R.R. Co.*, 126 S. W. 146, 129 S. W. 341. The Transit Company introduced the judgment of the Criminal Court which recited that Clark had entered a plea of guilty. Under Kentucky law, no objection to this evidence would have merit. It is true that, under Kentucky law, a defendant who pleads guilty has the right to testify in the subsequent civil proceedings as to the circumstances under which the plea was made, and he is permitted to explain his reasons for such a plea. *Race* v. *Chappel, supra.* Insurance Company counsel and Clark's personal counsel were *fully familiar with his right to explain his plea* and they were fully aware that an explanation would be helpful to Clark before the civil jury. The testimony of Insured's *personal* counsel, Hon. Frank E. Haddad, Jr., in his deposition in the District Court is crystal clear that Mr. Haddad and Insurance Company counsel discussed the import of

the introduction in evidence by the bus company of Clark's plea. This discussion was had during the trial of the case (R. 118b-120b). Haddad and Insurance Company counsel agreed that the matter of the guilty plea should not be brought up, if possible, and they then discussed with young Clark what explanation he could give of his plea of guilty in the event other parties introduced the plea in evidence. Young Clark proposed to his lawyers that he testify in explanation of his plea that he really didn't know what had happened in the Criminal Court, and that his attorney, Haddad, took care of the whole matter (R. 120b). Haddad, as an honorable man, *completely rejected this explanation* as untrue, because he had carefully advised Clark at every point in the criminal proceedings. Haddad and Insurance Company counsel were unwilling to be parties to an explanation by Clark which would be false testimony.

Throughout the trial of the State Court action, Insurance Company counsel was confronted with the most difficult decision as to what defense could be urged on behalf of the insured, Clark, that would be *viable* and calculated to serve Clark's best interest. Throughout the pre-trial negotiations, and constantly throughout the trial, Insurance Company counsel had offered its full policy limits in settlement of Clark's full responsibility. This finding was made by the District Judge in his decision granting summary judgment (R. 117a). Petitioners in the state court action *were not interested in Clark's $20,000.00.* They were interested *only* in obtaining additional recovery against the bus

company since they knew they could have Clark's $20,000.00 any time they wanted. They, therefore, vigorously asserted throughout the trial the theory of the joint and concurring negligence of the bus company driver. In this respect, the pre-trial discovery, the written statements of various witnesses obtained by the parties, the proceedings at the coroner's inquest and in the criminal action against Clark, further accentuated by the unanimous testimony of objective police officers that Clark was intoxicated, and the testimony of his passengers and the only impartial eye witness that Clark ran the boulevard stop made the possibility of convincing the jury that the *sole cause* of the collision was the bus driver's negligence a completely unrealistic possibility. To have asserted this defense, to the exclusion of all others, undoubtedly would have resulted in a large excess verdict against Clark.

An obvious alternative defense that might be asserted in view of the insurmountable evidence on the question of sole cause was the defense that the collision was the result of the joint and concurring negligence of Clark and the bus driver. Possibly, this might result in the jury placing some of the onus on the defendant bus company. This defense likewise presented Insurance Company counsel with considerable problems.

To assert the defense of joint and concurring negligence to the exclusion of any other defense might well result in exactly what did happen. Even though the jury concluded that there was joint and concurring

negligence, the jury would be permitted, as it was properly permitted under Kentucky law, to apportion the damages between the defendants. If the jury returned a verdict of $82,500.00 in the *Detenber* case and $80,000.00 in the *Townsend* case, and $62,000.00 in the companion personal injury *Ross* case *as it was authorized to do under the trial court's instructions,* any foreseeable apportionment of the verdict was virtually certain to result in an excess verdict against the insured, Clark. If the jury returned awards totaling $70,000.00 in all three cases, *as they in fact did,* and if the jury apportioned these awards on a 50/50 basis between Clark and the bus company, the result would be an excess verdict against Clark of more than $25,000.00. If, on the other hand, the jury concluded, as it did conclude, on the basis of the very evidence which convinced Insurance Company counsel that a successful defense on the basis of sole cause could not be maintained that Clark was 90% at fault, and the bus company 10% at fault, then a $70,000.00 verdict so apportioned would be an excess judgment of a most substantial amount and the inevitable result.

The third alternative available to Insurance Company counsel was the obvious defense of assumed risk on the part of Clark's passengers which would defeat any recovery against Clark if the jury accepted the substantial, probative, evidence available concerning drinking by Clark and his companions, and the reckless operation of the automobile in a previous hit and run accident and at the scene of the fatal accident.

The District Judge did not rely upon Petitioner's counsel's statement as to the fact situation presented in the state court. The District Judge had before him every line of the evidence transcribed in the state court proceedings and the deposition of Clark's *personal counsel* in the District Court. The District Court was, thus, aware that long prior to the trial, and continuously throughout the trial, Insurance Company counsel was attempting to pay Petitioners, the entire policy limits of Clark's policy. The District Court was aware from the uncontradicted evidence that Insurance Company counsel had advised Clark's private counsel long before trial, and on the morning of trial, that the defense of assumed risk would be asserted. The District Court was aware of the uncontradicted evidence that the Bus Company's counsel, pleaded and introduced reliable evidence that Clark's passengers *knowingly* rode with him while he and they were drinking, and while he was driving in a reckless manner. The District Court knew that Clark's personal counsel and Insurance Company counsel discussed with Clark his explanation of his plea of guilty in the related criminal case. The District Court knew from the uncontradicted evidence that neither, personal counsel nor Insurance Company counsel *would be a party to permitting Clark to testify falsely* as to why he pleaded guilty.

It was upon the basis of the undisputed evidence that the District Court determined, and the Circuit Court of Appeals concluded, that there was no issue of fact presented to the District Court and that the ac-

tion was one which might be appropriately disposed of by summary judgment as both parties were insisting. On the basis of the evidence, the District Court concluded that the Insurance Company was ready prior to the trial of this action and at the trial to pay its full policy limits, and that the conduct of the trial of the state court action by Insurance Company counsel was performed in a reasonably skillful, professional manner and revealed that the defendant Insurance Company exercised good faith in protecting the rights of its insured, Michael Clark.

2. The Decision of the Kentucky Court of Appeals in *State Farm Mutual Insurance Company* v. *Marcum* in Nowise Changes the Law of Kentucky Which Was Relied Upon By the District Court and the Circuit Court of Appeals and For This Reason Does Not Constitute an Intervening Circumstance of Substantial and Controlling Effect Within the Meaning of Rule 58 of the Rules of This Court.

The judgment of the District Court reveals on its face that in reaching a determination the District Judge was fully aware of the latest decisions of the Kentucky Court relating to the question of bad faith of an insurance company. *Georgia Casualty Company* v. *Mann,* 242 Ky. 447, 46 S. W. 2d 777; and *American Surety Company of New York* v. *J. F. Schneider & Sons,* 307 S. W. 2d 192. While an appeal was pending in this case in the Court of Appeals, the Kentucky Court decided *Harrod* v. *Meridian Mutual Insurance Company,* Ky., 389 S. W. 2d 74, 76 (1964). This de-

cision was brought to the attention of the Court of Appeals since it reaffirmed Kentucky's interpretation of "good faith" in the Georgia Casualty and American Surety Company cases. In *Harrod* v. *Meridian Mutual Insurance Company,* the Kentucky court "explained and specifically adopted" certain language contained in the Massachusetts case of *Spiegel* v. *Beacon Participations, Inc.,* 297 Mass. 398, 416, 8 N. E. 2d 895, 907. The Kentucky Court concluded that it had aligned itself with the majority of jurisdictions by adopting a definition of bad faith which required "conscious doing of wrong," or "a breach of a known duty through some motive of interest or ill will," or "anything that partakes of the nature of fraud." Based upon the definition adopted by Kentucky in *Harrod* v. *Meridian Mutual,* the highest appellate court of Kentucky affirmed the action of the trial court in granting the insurance company's motion for summary judgment.

Petitioners contend that in some fashion the Kentucky Court's decision in State Farm Mutual Insurance Company against Marcum *supra,* changes the law of Kentucky. Presumably petitioners are urging that because the Kentucky Court in this case found summary judgment improper and reversed the state trial court with instructions to submit the case to the jury, Kentucky law is changed. On the contrary, the Kentucky Court in the State Farm Mutual decision specifically referred to its previous decision in *Harrod* v. *Meridian Mutual* and specifically reaffirmed the def-

inition of "bad faith" contained in the Meridian opinion.

It is true that the Kentucky Court in State Farm Mutual holds that it was proper to submit the case to the jury, but it is vitally important to recognize that in the opinion of the Kentucky Court written by Mr. Justice Steinfeld, that the facts set forth in State Farm Mutual v. Marcum were "the unusual circumstances existing in this case".

The State Farm Mutual case, like the *Meridian Mutual* case and Georgia Casualty and American Surety Company cases, involved the failure of the Insurance Company to settle substantial claims within the limits of the policy where liability of the insured appeared reasonably certain. In Meridian Mutual, the Kentucky Court of Appeals concluded that under the circumstances of that case, the conduct of the Insurance Company in failing to settle did not, *as a matter of law,* constitute bad faith and, therefore, the granting of summary judgment by the trial court was justified and affirmed. On the other hand, the Kentucky Court of Appeals, considering the unusual circumstances set forth in State Farm Mutual against Marcum, concluded that the case should have been submitted to the jury under proper instructions.

The decision in State Farm Mutual does not change the law in Kentucky. It does not determine that all questions of Insurance Company's bad faith should be submitted to a jury. The decision in *Meridian Mutual* is equally the law of Kentucky as certainly as is the decision in State Farm Mutual. Kentucky remains

aligned with those jurisdictions who determine that "bad faith" must be exhibited by some competent evidence of conscious doing of wrong or partaking of the nature of fraud.

We respectfully submit, therefore, that petitioners should not be permitted to raise for the first time in the Supreme Court of the United States the question of the validity of summary judgment where they tried their case in the District Court and the Circuit Court of Appeals on the theory that they, indeed, were entitled to summary judgment, and we further respectfully submit that the Kentucky Court's decision in *State Farm Mutual Insurance Company* v. *Marcum* does not in anywise change or alter the law of Kentucky and that the District Court and the Circuit Court of Appeals, writing with an "Erie pen", correctly interpreted the Kentucky law.

We, therefore, respectfully and earnestly urge that the Petition for Rehearing of Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, John P. Sandidge, Counsel for American Universal Insurance Company, Respondent, in the matter styled "Pearl Detenber, Administratrix of the Estate of Terry Detenber, Deceased, and Viola B. Townsend, Administratrix of the Estate of Richard Mattingly, Deceased v. American Universal Insurance Company" do hereby certify that I served a true copy of the foregoing Response to Petition for Rehearing on Denial of Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit on the Petitioners on February 26, 1968, by delivering a copy thereof to Raymond C. Stephenson, 310 West Liberty Street, Louisville, Kentucky, 40202, Josephine P. Hughett, 314 Armory Place, Louisville, Kentucky, 40202, and Harry L. Hargadon, 1916 Kentucky Home Life Building, Louisville, Kentucky, 40202, and by depositing a copy of same in the United States mailbox, with first class air mail postage prepaid, addressed to Henry G. Fischer, 1735 De Sales Street, N. W., Washington, D. C., 20036, Counsel of record for the Petitioners.

John P. Sandidge.